ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of IMPLEMENTATION OF THE LOCAL COMPETITION PROVISIONS IN THE TELECOMMUNICATIONS ACT OF 1996	CC Docket No. 96-98

REPLY COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

TELECOMMUNICATIONS
RESELLERS ASSOCIATION

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SUMMARY

The Telecommunications Resellers Association ("TRA"), an organization consisting of more than 450 resale carriers and their underlying product and service suppliers, offers the following reply comments in response to the submissions of other commenters in the captioned rulemaking proceeding:

- Among the major stakeholders in this proceeding, IXCs, CAPs and other prospective competitive local exchange carriers seek to speed the emergence of meaningful local telecommunications competition through rapid deployment of both "physical" and "virtual" networks, as well as by means of traditional "total service" resale. Incumbent LECs strive to minimize the competitive threat to their monopoly bastion, seeking not only to delay competitive entry, but to undermine the viability of subsequent competitive offerings. And the States seek to preserve their jurisdictional realm of authority, resisting federal intrusion into an area that has traditionally been subject to their regulatory oversight.

- TRA urges the Commission to use as its touchstone in making policy determinations the ends the Congress sought to achieve in enacting Parts II and III of Title II of the Communications Act. Representing the telecommunications equivalent of the fall of the Berlin Wall, Sections 251, 252 and 253 are dedicated almost exclusively to eliminating both legal and practical barriers to, and facilitating, competitive entry into the previously restricted local telecommunications market. As if to emphasize the seriousness of the Congressional resolve in this respect, Section 251 provides not one, but three, methods by which such competitive entry can be achieved: interconnection of "physical" networks, deployment of "virtual" networks and traditional "total service" resale. Moreover, and perhaps even more tellingly, the Congress went the extra mile to ensure that each of these entry vehicles would indeed generate viable long-term competitive alternative local service offerings for consumers.

- Thus, when incumbent LECs seek to impose restrictions on the duty imposed on them by the '96 Act to offer all of their retail telecommunications services for resale at wholesale rates or to reduce the margin between retail and wholesale rates, they are thwarting the will of the Congress, by attempting to undermine the competitive viability, and hence, the competitive threat, of carriers offering local telecommunications service alternatives through traditional "total service" resale. When incumbent LECs seek to limit the extent of network unbundling or the points at which competitors can interconnect physical facilities to their networks, they are undermining Congressional initiatives by limiting the flexibility of

competitors in structuring their operations and hence, interfering with their ability to provide a competitive service. When incumbent LECs seek to limit the purposes for which unbundled network elements may be used, they are hindering realization of the ends the Congress sought to achieve by, among other things, eliminating an alternative means of competitive entry for non-facilities-based providers and hence, reducing the number and variety of competitive providers. When incumbent LECs seek to inflate the costs upon which interconnection charges and rates for unbundled network elements are based, they are attempting to maintain the status quo that the Congress sought to dramatically change by protecting their monopoly rents. When incumbent LECs seek to minimize the role of the Commission, relying instead upon hundreds of State proceedings and thousands of negotiations in which they could best leverage their position and resources to fend off competition, they are defeating Congressional efforts not only to structure a national policy framework, but to speed the availability of competitive local telecommunications service offerings.

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The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.1415, hereby replies to the comments submitted by other parties in response to the Notice of Proposed Rulemaking, FCC 96-182, released by the Commission in the captioned docket on April 19, 1996 (the "Notice"). In their comments, the parties address the "new regulatory paradigm for telecommunications"[1] the Commission has proposed to structure in fulfillment of its statutory obligation to implement the "local competition provisions" of the Telecommunications Act of 1996 ("'96 Act").[2]

The large majority of the parties submitting comments in this docket fall into one of three general categories: (i) potential new entrants into the local telecommunications market,

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[1] Notice, FCC 96-182 at ¶ 2.

[2] Pub. L. No. 104-104, 110 Stat. 56, § 101 (1996) ("'96 Act").

including facilities-based and resale interexchange carriers ("IXCs"),[3] competitive access providers ("CAPs")[4] and cable television ("CATV") system operators,[5] as well as consumer and business groups desirous of facilitating the prompt availability of competitive local service offerings,[6] (ii) incumbent local exchange carriers ("LECs"),[7] and (iii) States and State regulatory authorities.[8]

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[3] *See, e.g.,* Joint Comments of American Network Exchange, Inc. ("ANE") and U.S. Long Distance, Inc. ("USLD"); Comments of AT&T Corp. ("AT&T"), Cable & Wireless, Inc. ("C&W"), Frontier Corporation ("Frontier"), LCI International Telecom Corp. ("LCI"), MCI Telecommunications Corporation ("MCI"), SDN Users Association, Inc. ("SDN"), Sprint Corporation ("Sprint"), Telecommunications Carriers for Competition ("TCC"), WorldCom, Inc. d/b/a LDDS WorldCom ("WorldCom"), and Competitive Telecommunications Association ("CompTel").

[4] *See, e.g.,* Comments of American Communications Services, Inc. ("ACS"), Association for Local Telecommunications Services ("ALTS"), Hyperion Telecommunications, Inc. ("Hyperion"), IntelCom Group (U.S.A.), Inc. ("ICG"), MFS Communications Company, Inc. ("MFS"), Teleport Communications Group Inc. ("Teleport"), and Winstar Communications, Inc. ("Winstar").

[5] *See, e.g.,* Comments of Comcast Corporation ("Comcast"), Jones Intercable, Inc. ("Jones"), National Cable Television Association, Inc. ("NCTA"), Tele-Communications, Inc., and Time Warner Communications Holdings, Inc. ("Time Warner").

[6] *See, e.g.*, Comments of the Ad Hoc Telecommunications Users Committee ("Ad Hoc"), the Consumer Federation of America ("CFA") and Consumers Union (CU), and the United States Department of Justice ("DOJ").

[7] *See, e.g.,* Comments of Ameritech, the Bell Atlantic Telephone Companies ("Bell Atlantic"), BellSouth Corporation, BellSouth Enterprises, Inc. and BellSouth Telecommunications, Inc. (collectively, "BellSouth"), Cincinnati Bell Telephone Company ("Cincinnati Bell"), GTE Service Corporation ("GTE"), Pacific Telesis Group ("PacTel"), SBC Communications, Inc. ("SBC"), NYNEX Telephone Companies ("NYNEX"), US West, Inc. ("US West"), Southern New England Telephone Company ("SNET"), Puerto Rico Telephone Company ("Puerto Rico") and United States Telephone Association ("USTA").

[8] *See, e.g.,* Comments of the Alabama Public Service Commission ("Alabama"), the Alaska Public Utilities Commission ("Alaska"), the Arizona Corporation Commission ("Arizona"), the Attorney General of the Commonwealth of Massachusetts ("Massachusetts"), the Colorado Public Utilities Commission ("Colorado"), the Connecticut Department of Public Utility Control ("Connecticut"), the District of Columbia Public Service Commission ("District"), the Florida Public Service Commission ("Florida"), the Idaho Public Utilities Commission ("Idaho"), the Kentucky Public Service Commission ("Kentucky"),

[footnote continued on next page]

The positions taken by these respective groups of commenters are not unexpected. IXCs, CAPs and other prospective competitive local exchange carriers ("CLECs") seek to speed the emergence of meaningful local telecommunications competition through rapid deployment of both "physical" and "virtual" networks, as well as by means of traditional "total service" resale. Incumbent LECs strive to minimize the competitive threat to their monopoly bastion, seeking not only to delay competitive entry, but to undermine the viability of competitive offerings. And the States seek to preserve their jurisdictional realm of authority, resisting federal intrusion into an area that has traditionally been subject to their regulatory oversight. Each group, of course, contends that its approach, and generally its approach alone, will fully realize the "pro-competitive, de-regulatory national policy framework" embodied in the '96 Act.[9]

[footnote continued from preceding page]

the Louisiana Public Service Commission ("Louisiana"), the Maryland Public Service Commission ("Maryland"), the Missouri Public Service Commission ("Missouri"), the National Association of Regulatory Utility Commissioners ("NARUC"), the New York State Department of Public Service ("New York"), the North Dakota Public Service Commission ("North Dakota"), the Oklahoma Corporation Commission ("Oklahoma"), the Oregon Public Utility Commission ("Oregon"), the Pennsylvania Public Utility Commission ("Pennsylvania"), the Public Service Commission of Wisconsin (Wisconsin), the Public Utility Commission of Ohio ("Ohio"), the South Carolina Public Service Commission ("South Carolina"), the Washington Utilities and Transportation Commission ("Washington"), the Wyoming Public Service Commission ("Wyoming"), and Comments of the States of Maine, Montana, Nebraska, New Hampshire, Utah, Vermont and South Dakota.

[9] S. Conf. Rep. No. 104-230, 104th Cong., 2nd Sess., p. 1 (Jan. 31, 1996) ("Joint Explanatory Statement").

I. Congressional Intent Should Be The Touchstone Of The Commission's Policy Determinations

In evaluating the arguments and views of the various stakeholders, TRA urges the Commission to use as its touchstone the ends the Congress sought to achieve in enacting Parts II and III of Title II of the Communications Act of 1934, as amended ("'34 Act").[10] Certainly, one of those goals was not maintenance of the status quo; the Congress clearly did not intend to settle for "business as usual" in the telecommunications marketplace of tomorrow. No less obviously, the '96 Act was meant to be more than a vehicle by which the Regional Bell Operating Companies ("RBOCs") could achieve their "holy grail;" simple repeal of the Modification of Final Judgment ("MFJ") would have allowed the RBOCs to enter the interLATA telecommunications market and the other "lines-of-business" from which the RBOCs have been barred since divestiture.[11] Nor did the Congress intend to merely tweak the '34 Act, refining, but not supplanting, the existing regulatory regime with a new regulatory paradigm for telecommunications.

To the contrary, the Congress set out to, and most certainly did, reshape the telecommunications landscape to a dramatic extent. The principal objective of the Congressional initiatives reflected in new Parts II and III of Title II was the "opening [of] all telecommunications markets to competition;"[12] indeed, Part II of Title II was aptly labeled

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[10] Pub. L. No. 104-104, 110 Stat. 56, § 101, 151 (1996).

[11] *See* 47 U.S.C. § 601.

[12] Joint Explanatory Statement at 1.

"Development of Competitive Markets" by the Congress.[13] Representing the telecommunications equivalent of the fall of the Berlin Wall, Sections 251, 252 and 253 are dedicated almost exclusively to eliminating both legal and practical barriers to, and facilitating, competitive entry into the previously restricted local telecommunications market. As if to emphasize the seriousness of the Congressional resolve in this respect, Section 251 provides not one, but three, methods by which such competitive entry can be achieved: interconnection of "physical" networks, deployment of "virtual" networks and traditional "total service" resale.[14] Moreover, and perhaps even more tellingly, the Congress went the extra mile to ensure that each of these entry vehicles would indeed produce a viable long-term competitive alternative local service offerings for consumers.

Thus, the Congress did not simply require incumbent LECs to offer "network elements" on an unbundled basis, it mandated network unbundling wherever and whenever "technically feasible," took pains to require that unbundling be undertaken in a manner that allowed for the provision of all telecommunications services, and directed that the unbundled network elements be made available to competitors at cost.[15] Similarly, the Congress did not simply prohibit incumbent LECs (as the Commission has done with respect to IXCs) from imposing unreasonable or discriminatory restrictions on the resale of their local services; instead, it took the additional step of guaranteeing a "margin" within which resale carriers could viably

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[13] 47 U.S.C. §§ 251 - 261.

[14] 47 U.S.C. §§ 251(c)(2), 251(c)(3), 251(c)(4).

[15] 47 U.S.C. §§ 251(c)(3), 252(d)(1)(A).

operate by requiring that retail services be made available for resale at "wholesale rates."[16] And with respect to physical interconnection, the Congress not only mandated, as it had with regard to unbundled network elements, that incumbent LECs permit interconnection to their networks at any "technically feasible point" and make such interconnection opportunities available at cost, but directed that the interconnection be of a quality comparable to that the incumbent LECs provide themselves and their affiliates.[17]

Further to this end, Section 251 imposes on incumbent LECs a number of requirements that will not merely facilitate competitive entry, but will enhance the competitive viability of the services offered by new market entrants. Thus, Section 251 directs incumbent LECs to provide number portability, intraLATA dialing parity, physical collocation opportunities, advance notice of network changes, reciprocal compensation arrangements and non-discriminatory access to rights-of-way.[18] In a further effort to "level the playing field", the Congress even went so far as to provide for impartial number administration.[19] By each such action the Congress eliminated a competitive advantage possessed by incumbent LECs solely by virtue of their historical position as monopoly providers of local telecommunications service.

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[16] 47 U.S.C. §§ 251(c)(4), 252(d)(3).

[17] 47 U.S.C. §§ 251(c)(2), 252(d)(1)(A).

[18] 47 U.S.C. §§ 251(b), 251(c)(5)(6).

[19] 47 U.S.C. §§ 251(e).

Finally, the Congress looked to the Commission to promulgate implementing regulations.[20] While it carved out a role for the States, the Congress thrust upon the Commission the primary responsibility for realizing the "pro-competitive, deregulatory national policy framework" it envisioned. In so doing, the Congress was obviously aware that the local market had historically been within the regulatory bailiwick of the States and that it was significantly expanding the Commission's traditional jurisdictional role.

In short, the Congress intended for the American public to derive the maximum benefit from the competitive provision of telecommunications products and services by multiple vendors. To this end, the Congress did not simply remove legal and regulatory barriers to competitive entry into the local and other telecommunications markets. Rather, the Congress took such additional steps as were necessary to ensure that competitors were afforded a legitimate opportunity to survive and prosper. Accordingly, the Congress eliminated technical and economic barriers to entry as well. As the Commission has recognized, "[t]he Act envisions that removing legal and regulatory barriers to entry and reducing economic impediments to entry will enable competitors to enter markets freely, encourage technological developments, and ensure that a firm's prowess in satisfying consumer demand will determine its success or failure in the marketplace."[21]

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[20] 47 U.S.C. § 251(d).

[21] Notice, FCC 96-182 at ¶ 1.

The Commission is absolutely correct that the "entry policy" envisioned by the '96 Act is "pro-competition, not pro-competitor."[22] But this policy cuts two ways. Certainly, it means that entry should not be fostered irrespective of associated costs. It also means, however, that all impediments to a meaningful opportunity to compete must be eliminated. Just as new market entrants cannot expect regulatory concessions which foster inefficiency, incumbent LECs cannot expect to retain advantages which they now possess solely by virtue of their historical position as monopoly providers of local telecommunications services. Even if the Commission were to "remove both the legal and regulatory barriers and economic impediments that inefficiently retard entry."[23] the proverbial playing field would not be leveled. Incumbent LECs have market shares approaching 100 percent, lifetime relationships with subscribers and marketing advantages that far too often will be impossible for competitors, particularly smaller competitors, to overcome. The Commission recognized as much when it noted that at least initially it may be necessary to "replicat[e] competitive outcomes where competition is infeasible or not yet in place."[24]

Thus, when incumbent LECs seek to impose restrictions on the duty imposed on them by the '96 Act to offer all of their retail telecommunications services for resale at wholesale rates or to reduce the margin between retail and wholesale rates, they are thwarting the will of the Congress, by attempting to undermine the competitive viability, and hence, the competitive

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[22] Id. at ¶ 12.

[23] Id.

[24] Id.

threat, of carriers offering local telecommunications service alternatives through traditional "total service" resale. When incumbent LECs seek to limit the extent of network unbundling or the points at which competitors can interconnect physical facilities to their networks, they are undermining Congressional initiatives by limiting the flexibility of competitors in structuring their operations and hence, interfering with their ability to provide a competitive service. When incumbent LECs seek to limit the purposes for which unbundled network elements may be used, they are hindering realization of the ends the Congress sought to achieve by, among other things, eliminating an alternative means of competitive entry for non-facilities-based providers and hence, reducing the number and variety of competitive providers. When incumbent LECs seek to inflate the costs upon which interconnection charges and rates for unbundled network elements are based, they are attempting to maintain the status quo that the Congress sought to dramatically change by protecting their monopoly rents. When incumbent LECs seek to minimize the role of the Commission, relying instead upon hundreds of State proceedings and thousands of negotiations in which they could best leverage their position and resources to fend off competition, they are defeating Congressional efforts not only to structure a national policy framework, but to speed the availability of competitive local telecommunications service offerings.

The States' interests are far less mercenary than those of the incumbent LECs, but the positions they have espoused in this proceeding are no less inconsistent with the will of the Congress. In seeking to protect their regulatory turf, the States ignore the clear Congressional intent that the '96 Act result in a "national policy framework" which will "accelerate . . .

deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[25] Only the Commission can create and implement a national policy framework and the only way to ensure that competitive entry into the local telecommunications market is neither delayed nor rendered ineffective is for the Commission to prescribe a blueprint and detailed implementing regulations to govern such entry in a single forum in which the differences in the parties' respective resources are minimized to the maximum extent possible. Multiple State proceedings, much less individual negotiations, play to the incumbent LECs' strengths, allowing them to fully leverage their market position and localized resource concentrations.

As noted above, the will of the Congress should be the touchstone of the Commission's policy determinations and it is the will of Congress that the American public benefit as quickly as possible and to the greatest possible degree from the competitive provision of local telecommunications services. The Commission should not be deterred from its mission by the pecuniary interests of incumbent LECs in retention of their local monopolies or by the parochial desires of the States to protect their jurisdiction.

II. The Commission Should Avoid Actions That Will Undermine The Competitive Viability Of Traditional "Total Service" Resale Of Local Telecommunications Services (¶¶ 172 -194)

The incumbent LECs urge the Commission to impose a variety of limits on their statutory obligation to make their retail services available for resale at wholesale rates, arguing,

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[25] Joint Explanatory Statement at 1.

for example, that they should not be required to offer various promotional or discounted offerings, including customer specific volume and term arrangements, at wholesale rates, that retail services priced below cost should be exempted from any resale requirement, that various "class of service" restrictions on resale should be sanctioned, and that they should not be compelled to provide to resale carriers existing service arrangements which although still being provided, are either no longer being offered or no longer being offered as a retail service offering.[26] The incumbent LECs further seek to minimize the differential between retail and wholesale rates, contending that the margin should reflect "net avoided costs," rather than "avoided costs" and that no deduction should be made for allocable fixed and/or common costs.[27] Finally, the incumbent LECs seek the flexibility to vary the percentage differential between retail and wholesale prices, reserving to themselves the ability to strategically manipulate rates and charges.[28] In all cases, the incumbent LECs support their views with assertions of equity and reasonableness. TRA strongly disagrees.

It is a truism, as TRA vigorously argued in its initial comments, that carriers with large market shares will actively resist resale. As TRA last year documented in its opposition to AT&T's request to be reclassified as a non-dominant carrier and elsewhere, AT&T has for years sought to avoid its resale obligations and indeed, has consistently used its market position

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[26] *See, e.g.,* Comments of USTA at 70-73, NYNEX at 74-80, GTE at 44-52, Ameritech 51-57, BellSouth at 65-66, Bell Atlantic at 45-46.

[27] *See, e.g.,* Comments USTA at 73-75, NYNEX at 81-84, GTE at 52-53, BellSouth at 66-69, Bell Atlantic at 44-45.

[28] *See, e.g.,* Bell Atlantic at 46-47; USTA at 74-75.

to disadvantage its resale carrier customers.[29] AT&T has done so through myriad stratagems, including, among others, discriminatory denial of both preferred service offerings and superior price points, systematic abuse of confidential carrier data, and persistent provisioning and billing delays and distortions. The motives of AT&T for such conduct are manifest. Given AT&T's roughly 60 percent market share, it is likely that on average, six out of every ten customers that have been, and that will be, enlisted by resale carriers were or are AT&T customers. Whereas resale carriers produce a net gain for a carrier such as Sprint with a ten percent market share, for AT&T they represent a net loss.

Unlike AT&T, incumbent LECs do not hold a 60 percent market share. Rather, the market share of an incumbent LEC approaches 100 percent. Thus, every customer enlisted by a resale carrier for its local telecommunications service will be a customer lost by an incumbent LEC. The resistance of incumbent LECs to resale, accordingly, will likely far outstrip that of AT&T. As veterans of the wars with AT&T in the interexchange market, TRA and its resale carrier members can assure the Commission that the incumbent LECs will seize each and every opportunity afforded them (and likely many opportunities not afforded them) to avoid their resale obligations and diminish the competitive impact of resale carriers. Accordingly, TRA urges the Commission to look with a healthy dose of skepticism at any suggested limitation on resale or requested flexibility in providing for resale. Although each may superficially appear

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[29] Comments of the Telecommunications Resellers Association in opposition to "Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier" filed June 9, 1995 at 15-32, Appx. 2; *see also* Comments of the Telecommunications Resellers Association in CC Docket No. 96-61 filed April 25, 1996 at 22-24.

harmless, restrictions on resale represent a "Pandora's box" which when opened will not only be used by incumbent LECs to hinder resale, but will generate a continuing source of controversy with which the Commission and State regulatory authorities will be required to regularly deal. As the Commission has tentatively concluded, "[g]iven the pro-competitive thrust of the 1996 Act and the belief that restrictions and conditions are likely to be evidence of an exercise of market power, . . . the range of permissible restrictions should be quite narrow."[30]

Certainly, exempting an incumbent LEC's promotional or discounted offerings from the resale obligations that would otherwise apply thereto does not fall within the "range of permissible restrictions" to which the Commission refers above: indeed, such an exemption would effectively constitute a license to avoid resale altogether and would likely render resale meaningless as a competitive source of local telecommunications service for consumers. Applying the healthy dose of skepticism recommended above, it is not difficult to see how such an exemption could (and would) be abused. Rates for promotional or discounted offerings could be reduced to near, at or even below wholesale rates, rendering it effectively impossible for a resale carrier to price compete. Services, classes of customers or even individual customers could be strategically targeted to inflict the greatest competitive damage; indeed, as incumbent LECs are awarded increased pricing flexibility, they could follow the lead of AT&T and structure "competitive response" offerings which make preferred rates available only to those customers that have been approached by a competitor. Not surprisingly, USTA has already recommended that service arrangements negotiated to meet competition should be exempted from resale

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[30] Notice, FCC 96-182 at ¶ 175.

requirements.[31] And other incumbent LECs have suggested that customer-specific transactions should likewise be withdrawn from the resale category.[32] In short, incumbent LECs seek, but certainly should not be awarded, the flexibility essentially to price around resale requirements whenever it would suit their strategic objectives.

Imposing resale obligations on promotional and discounted offerings would not hinder competition or reduce downward pricing incentives. Incumbent LECs will face nascent competition from a variety of sources in addition to resale carriers, including facilities-based carriers, as well as "virtual network" operators, and competitive pricing will ultimately be necessary to fend off these providers. And once competition takes hold, market forces, not carrier choice, should drive pricing decisions. Moreover, exempting promotional and discounted offerings from resale requirements would not foster true price competition. Price reductions that are designed to drive competitors from the market do not produce long-term gains for consumers; ultimately consumers are required to pay more to compensate the surviving carrier for its aggressive short-term predatory pricing.

Nor do the incumbent LECs' equitable arguments against requiring that promotional and discounted offerings be made available at wholesale rates carry any persuasive weight. As discussed above, incumbent LECs retain overwhelming competitive advantages *vis-a-vis* new market entrants. Claims made by a carrier possessed of a 100 percent market share and lifelong relationships with all consumers in a market that it is being disadvantaged by not being

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[31] Comments of USTA at 72-73.

[32] Comments of US West at 68.

able to underprice small new market entrants simply strain credibility.

Similar problems arise with respect to "class-of-service" restrictions and exemptions based on whether an individual service is fully recovering its costs. Authorizing the States to allow expansive "class-of-service" restrictions incents incumbent LECs to pepper State regulators with requests for such exemptions, affording them the opportunity to leverage their market position and resource concentrations to overwhelm small and mid-sized resale carriers in regulatory battles. To avoid this eventuality, the Commission should itemize in advance the "class-of-service" restrictions that a State may authorize, limiting such restrictions to only those necessary to preserve universal service. Thus, for example, as TRA recognized in its comments, it would certainly be appropriate to prohibit the resale of residential service which receives explicit universal service support to other than the intended recipients of that support. Most other "class-of-service" restrictions, however, would simply foster discrimination and allow incumbent LECs to strategically manipulate the manner in which their services could be resold to the detriment of resale providers.[33]

Predicating the availability of a service for resale on whether it is priced above, at or below cost would invite not only a like degree of strategic manipulation, but would generate endless disputes over claims and counterclaims regarding costing issues. If resale carriers are to constitute a viable competitive force in the local telecommunications market, they cannot be

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[33] Restrictions on the customers to whom a service may be provided and on how and for what purpose it may be provided should generally be eliminated. Restrictions of this nature tend to be discriminatory and requiring resale carriers to honor them perpetuates rather than cures the discrimination.

denied access to key services simply because of carrier or regulatory pricing decisions unrelated to them. Moreover, given that the differential between retail and wholesale rates is "avoided costs," incumbent LECs should not be any more adversely impacted by a below cost wholesale offering than by a below cost retail offering.

The requests of incumbent LECs to "grandfather" from resale obligations services which are no longer being offered, but are still being provided, or to allow them to avoid resale obligations by withdrawing services from retail offerings also must be rejected to avoid strategic manipulation. Resale carriers must compete with incumbent LECs for the business of customers using such "grandfathered" services; freeing these services from resale requirements thus would place resale carriers at an insurmountable competitive disadvantage. Allowing an incumbent LEC to continue to offer a service that has been "withdrawn" from the retail category would produce a no less adverse impact. In instances such as these, an incumbent LEC should not be permitted to refuse to make a service available for resale until it has discontinued the provision of that service altogether; if a service is being provided to any customer it must be offered to resale carriers as well and provided at wholesale rates.[34]

Even more potentially detrimental to the prospects of a dynamic local resale industry are the efforts of incumbent LECs to minimize the differential between retail and wholesale rates. As TRA explained in its comments, resale carriers live in the margin between

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[34] This nondiscrimination theme also applies to an argument made by GTE that incumbent LECs should be permitted to decline to make a service available for resale if they are experiencing capacity shortages. GTE Comments at 51-52. The short answer is that resale carriers are customers and should be treated no differently than other customers when capacity limitations arise.

the price they must pay for a service and the price they can charge their customers for that service, understanding that they must price below their far larger facilities-based rivals in order to be competitive. Margins of 30 to 50 percent are generally acknowledged to be a prerequisite for a dynamic resale industry. Efforts to shrink margins below these levels represent a thinly disguised attempt to undermine the viability of resale as a source of competition.[35]

The Congress has mandated that the differential between retail and wholesale rates shall be the aggregate amount of avoided marketing, billing, collection and other costs.[36] Incumbent LECs argue, however, that "avoided costs" should be read to mean "net avoided costs." First, the statute says otherwise. Section 252(d)(3) mandates the exclusion of all "marketing, billing, collection and other costs" that an incumbent LEC "avoids" as a result of the wholesale, as opposed to the retail, provision of service: Section 252(d)(3) does not provide for a reduction of these "avoided costs" by additional amounts allegedly expended to provide service to resale carriers. Second, as stressed in the preceding section of these reply comments, use of "net avoided costs" would undermine the will of the Congress that resale provide a viable source of local telecommunications competition; the viability of the margins resulting from the exclusion of only "avoided costs" will likely be borderline even without adjustment for the claimed costs of providing resale services. As the Commission has noted, the State of California has computed wholesale discounts ranging from seven to seventeen percent based on "identified costs

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[35] US West goes one step further and argues that resale carriers should not be provided service at wholesale rates unless they commit to take large volumes of service for extended terms. US West Comments at 65. Needless to say Section 252(c)(3) provides otherwise.

[36] 47 U.S.C. §§ 252(d)(3).

attributable to retailing functions."[37] Third, it is highly unlikely, no matter how precise or detailed the calculations, that all costs associated with offering retail, but not wholesale, services will be identified; any reduction of "avoided costs" to account for additional costs incumbent LECs allegedly incur in the provision of wholesale services would thus merely exacerbate an existing inequity. And this is particularly true given the complexity of determining all those portions of general and administrative expense and other overhead costs that are properly allocable to retail functions. Claims that common or fixed costs should not be factored into the calculation of wholesale rates should be summarily rejected. While it may be true that these costs are not eliminated by virtue of resale, those portions allocable to activities no longer required of the incumbent LEC for this reason should be reallocated to activities which are still being performed.

Finally, the Commission cannot, consistent with the Congressional intent that meaningful local service resale opportunities be provided, afford incumbent LECs the flexibility to vary the wholesale discount percentages across services While incumbent LECs argue that the variations in percentage discounts can be based on variations in "avoided costs" among services, the data upon which such determinations would be made resides entirely with the incumbent LECs. Hence, in the absence of detailed rate proceedings, neither regulators nor resale competitors would be in a position to challenge the basis for claimed "avoided cost" variations among services. Incumbent LECs would thus be able to strategically manipulate wholesale

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[37] Notice, FCC 96-182 at ¶ 183.

discounts at will or consume the limited resources of smaller competitors in endless regulatory proceedings. Either way, they win and the consuming public loses.[38]

As TRA entreated the Commission in its comments, it is imperative that the Commission anticipate the highly-predictable behavior of monopolists facing competitive entry and limit the ability of incumbent LECs to leverage their market position to thwart the will of the Congress that resale provide an alternative source of local telecommunications service for consumers. The only way to achieve this end is to minimize opportunities by which incumbent LECs can "game" the system by providing the States with a detailed blueprint for implementing local resale and by severely limiting exceptions to the clear statutory mandate that incumbent LECs offer for resale at wholesale rates any telecommunications service that the carriers provide at retail. Resale can provide consumers with lower prices and superior customer service if resale carriers are afforded a meaningful opportunity to provide a full complement of services at competitive prices. This is clearly what the Congress intended in enacting Sections 251(b)(1), 251(c)(3) and 252(d)(3). TRA's resale carrier members are eager to help the Congress realize this goal. TRA strongly urges the Commission to afford them the opportunity to do so.

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[38] Ameritech suggests an approach even more susceptible to strategic manipulation. Ameritech asks the Commission to allow it to offer a single retail rate representing the weighted average of all the various retail rates charged for a service. Ameritech Comments at 58-59. Rates should not be manipulable by incumbent LECs. The only way to avoid problems of this sort is to specify a fixed discount applicable to all retail charges.

III. The Commission Should Ensure That "Virtual Network" Deployment Provides A Viable Means Of Market Entry For Non-Facilities-Based Providers (¶¶ 74 -157)

As noted above, the Congress provided multiple vehicles by which prospective competitive providers of local telecommunications services could enter the local market, one of which was by means of recombining network elements acquired from an incumbent LEC on an unbundled basis. The incumbent LECs seek to deny non-facilities-based carriers the opportunity to deploy "virtual networks" by reading into the '96 Act a requirement that any such "virtual network" must include one or more physical network components provided by the entity acquiring the unbundled network elements.[39] The incumbent LECs also seek to restrict competitors' ability to serve their local customers using a combination of "virtual network" and resold services.[40] And the incumbent LECs endeavor to diminish the viability of "virtual network" operation by limiting the extent to which the network must be unbundled and by inflating the rates at which the unbundled network elements will be made available.[41] TRA once again strongly urges the Commission to deny these efforts to thwart the will of Congress that new market entrants have effective, affordable access to unbundled network elements as a means of serving their customers.

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[39] *See, e.g.,* Comments of USTA at 76-77, Bell Atlantic at 13, Ameritech at 29-30, PacTel at 25-26.

[40] *See, e.g.,* Comments of NYNEX at 38-39, BellSouth at 31-33, Ameritech at 26-28, PacTel at 90-91.

[41] *See, e.g.,* Bell Atlantic at 16-17, 35-40, NYNEX at 46-48, 61-66, 70-71, BellSouth at 15-19, 49-59, USTA at 10-13, 36-57, GTE at 28-33, 59-65

As TRA stressed in its comments, the joint mandate of Sections 251(c)(3) and 251(d)(1) could not be clearer. Every incumbent LEC has the duty to provide to any telecommunications carrier for the provision of any telecommunications service access at any technically feasible point on an unbundled and nondiscriminatory basis all facilities and equipment used in the provision of a telecommunications service, including the features, functionalities and capabilities provided thereby, at cost, including a reasonable profit.[42] Moreover, Section 251(c)(3) directs the incumbent LECs to provide the unbundled network elements in a manner that allows the requesting carriers to combine such elements to provide any telecommunications service.

While the definitions of such terms as "technical feasibility," "facility or equipment," "cost," and "reasonable profit" obviously must be hammered out, there is no room for interpretation as to who may obtain unbundled network elements, the extent to which these unbundled network elements may be combined and, once combined, their availability for use to provide local telecommunications services. Any telecommunications carrier must be afforded access to unbundled network elements. Such access is not limited to full or partial facilities-based carriers; by the clear words of Section 251(c)(3), such access extends to non-facilities-based providers as well. Moreover, non-facilities-based providers are no more limited by Section 251(c)(3) than full or partial facilities-based providers in their ability to combine any network elements acquired on an unbundled basis to realize network capability by which they may provide their customers with a full panoply of local telecommunications services. Section

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[42] 47 U.S.C. §§ 153(45), 251(c)(3), 251(d)(1).